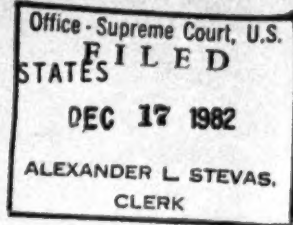


82-1140
SUPREME COURT OF THE UNITED STATES

January Term, 1983



RICHARD W. McLEAN, PETITIONER

versus

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals err in holding that a 44,000 acre tract of land within the Great Smoky Mountains National Park in North Carolina could be included within the boundaries of the park when the inclusion of the 44,000 acre tract violates 16 U.S.C. 403 which is the Enabling Act that created the Great Smoky Mountains National Park?

2. Can the United States Government donate property to itself without complying with Federal Statutes authorizing transfers of Federal Property under certain specific conditions?

PARTIES TO THE PROCEEDING**Petitioner:****Richard W. McLean****Respondent:****United States of America**

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	1
PARTIES TO THE PROCEEDING.....	11
OPINIONS BELOW.....	1
STATEMENT OF JURISDICTION.....	1
STATUTE INVOLVED.....	1
STATEMENT OF THE CASE.....	3-8
REASONS FOR GRANTING THE WRIT	

- I. The Court of Appeals for the Fourth Circuit held that although the 44,000 acres of land known as the Fontana Addition was purchased with public monies, the transfer by the Tennessee Valley Authority (TVA) to the Great Smoky Mountain National Park constituted a "public donation" thereby allowing the property to be included within the park boundaries. However, this interpretation is in error since the first part of the Statute prohibited monies from being used to acquire the lands within the boundaries and secondly, the TVA as an agent of the Federal Government cannot transfer land to another agency without complying with Federal Statutes which specifically set out how and when lands can be transferred from one agency to another.....8

- II. There has been a standing conflict for over 40 years as to whether a 44,000 acre tract of land purchased by the TVA with Federal funds can be included within the boundary of the Great Smoky Mountains National Park because of the language set out in the Enabling Act which created the Great Smoky Mountains National Park. This is a case of first impression as to whether lands purchased with public monies may be included within the boundaries of the Great Smoky Mountains National Park and thereby subject to Federal criminal jurisdiction enforceable against the public within this area.....10

CONCLUSION.....12

APPENDIX:

- A- United States District Court (Judge Jones) Memorandum and Order..... 1a
- B- Opinion of United States Court of Appeals for Fourth Circuit.....18a
- C- Order Denying Rehearing..... 23a

TABLE OF AUTHORITIES

Page

<u>United States v. Welch, 327 U.S.</u> <u>546; 66 S. Ct. 715 (1946).....</u>	<u>7, 10, 11</u>
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Statutes Cited

16 U.S.C. Sec. 403.....	<u>passim</u>
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Public Law 40 U.S.C.:

Section 471.....	<u>passim</u>
Section 472.....	<u>passim</u>
Section 481.....	<u>passim</u>
Section 483.....	<u>passim</u>

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PETITION FOR A WRIT OF CERTIORARI TO
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Petitioner Richard W. McLean prays that
a writ of certiorari issue to review the
judgment and opinion of the United States
Court of Appeals for the Fourth Circuit in
these proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals is published in ___ F.2d___ (4th Cir., 1982).

JURISDICTION

The Judgment of the Court of Appeals was rendered September 8, 1982. A Petition for Rehearing was denied on October 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

STATUTORY PROVISIONS INVOLVED

The following section of the Act which created the Great Smoky Mountains National Park is involved in this case.

1. 16 U.S.C. Sec. 403 provides in relevant part, "When title to lands within the area referred to in this section shall have vested in the United States in fee simple there shall be established, dedicated, and set apart as public parks for the benefit and enjoyment of the people, the tract ... of land in the Great Smoky Mountains in the State of North Carolina and Tennessee approximately 704,000 acres ..., which area or parts thereof as may be accepted on behalf

of the United States in accordance with the provisions hereof, shall be known as the Great Smoky Mountains National Park.

Provided, that the United States shall not purchase by appropriation of public monies any land within the aforesaid areas but that such lands shall be secured by the United States only by public or private donation."

2. Public Law 40 U.S.C. Sec. 471; Sec. 472; Sec. 481; Sec. 483 which deal with the management and disposal of government property and deal in pertinent part:

40 U.S.C. 483 (a) In order to minimize expenditures for property the Administrator shall prescribe policies and methods to promote the maximum utilization of excess property by executive agencies and shall provide for the transfer of excess property among Federal agencies into the organizations specified in Sec. 756 (f) of this Title. The Administrator with the approval of the Director of the Budget shall prescribe the extent of reimbursement for such transfers of excess properties; provided, that reimbursement shall be required of the fair value as determined by the Administrator of any excess

property transferred... whenever either the transfer or the transferee agency... is subject to the Government Corporation Control Act...; and the excess property determined by the Administrator be suitable for distribution to the supply centers of the General Services Administration shall be retransferred as prices fixed by the Administrator... with due regard to the prices established in Section 756 (d) of this Title.

3. 40 U.S.C. 483 (h) entitled

"Abandonment, Destruction or Donation of Property" reads in pertinent part:

(h) The Administrator may authorize the abandonment, destruction or donation to public bodies of property which has no commercial value or of which the estimated cost of continuing care and handling would exceed the estimated proceeds from the sale.

The Surplus Property Act of 1944 at 58 Stat. 756 which is classified in 1611 through 1614, 1615 through 1621, 1622, 1623 through 1632, 1633 through 1646 of the Appendix to Title 50 War and National Defense.

STATEMENT OF THE CASE

In 1926 Congress enacted an Act which provided for the creation of the Great Smoky

Mountains National Park. 16 U.S.C. 403 authorizes the creation of the park under the provisions of the Enabling Act as set forth in that Statute. Under the Enabling Act, when the United States of America had obtained property in its name in fee simple sufficient to meet the minimum requirements of this Act, the Government set aside the Great Smoky Mountains National Park. However, a limiting provision was added to this Act which said that no public monies should be used to purchase the lands in this area but that such lands should only be secured by the United States by public or private donation. Thereafter, the State of Tennessee and the State of North Carolina established two Park Commissions which condemned the land or purchased the land from its residents and after obtaining title, deeded to the United States the property within the boundaries described in the Secretary of Interior's

report of April 14, 1926.

When this was done the Great Smoky Mountains National Park was created. However, in 1941, the Tennessee Valley Authority decided to construct a dam along an area bordering the then-existing park boundary. The Tennessee Valley Authority as a quasi-public corporation of the United States either purchased or condemned 44,000 acres of land. The land was acquired with public money appropriated by Congress. The Tennessee Valley Authority took the land in the name of the United States of America. The Tennessee Valley Authority transferred the 44,000 acres, known as the "Fontana Addition" to the Department of Interior who has administered the land within the boundaries of the Great Smoky Mountains National Park. This was done by transfer agreement signed in 1949. Thereafter, the park continued to administer the property

as park lands.

On December 6, 1980, the Defendant, Richard W. McLean was charged with carrying a loaded firearm within the Great Smoky Mountains National Park in violation of CFR Title 36, Sec. 2.11(a). The Defendant was charged with carrying this firearm within the boundaries of the 44,000 acre tract known as the Fontana Addition acquired by the United States by way of deed or condemnation through the acquisition of the TVA in the 1940's.

At the time of the hearing in Magistrate's Court, the Defendant moved to dismiss the warrant for lack of subject matter and in persona jurisdiction and maintained that the Department of the Interior lacked authority to administer the 44,000 acre tract as part of the Great Smoky Mountains National Park. The Defendant was convicted and thereafter renewed its motion to dismiss in U.S. District Court before the Hon. Woodrow A. Jones. The Defendant again

raised the jurisdictional issue and moved to dismiss the criminal summons on the ground that the acquisition of the property known as the 44,000 Fontana Addition was in violation of 16 U.S.C.A., Sec. 403 in that the land on which the Defendant was charged with carrying a firearm was property acquired with Federal monies and therefore could not be included within the park boundary. The Hon. Woodrow Jones by order of December 1, 1981, ruled that the Supreme Court of the United States approved the acquisition and knew of and discussed the transfer of the lands to the Interior Department for inclusion in the park in a case entitled "United States vs. Welch", 327 U.S. 546; 66 S.Ct. 715, (1946) and that as a result of the holding in Welch, the Supreme Court of the United States recognized the land was to be included even though the case did not specifically speak to the transfer of the lands to the Department of the Interior. Justice Reid at the time acknowledged that

this question was not before the Court. However, Judge Jones held in his order that the public funds were used by the TVA and under its authority the transfer of lands to the Department of the Interior constituted a public donation permitted by 16 U.S.C.A., Sec. 403.

From the decision of Judge Jones the Defendant gave timely notice of appeal to the United States Court of Appeals for the Fourth Circuit. On appeal the Court of Appeals affirmed the Order of Judge Jones and held that the transfer to the Department of the Interior of the property was a "public donation" as allowed under 16 U.S.C.A. Sec. 403.

REASONS FOR GRANTING THE PETITION

I. This case presents an important question concerning the right of the Department of the Interior to Administer and attempt to include 44,000 acres of land within the Great Smoky Mountains National

Park which appears to be in clear violation of the Enabling Act. In addition, this case raises serious question as to whether this transfer was an authorized transfer allowed by the Surplus Property Act of 1944 and by the Management Property Act set out in 40 U.S.C. Sec. 471 through 483. The District Court and the Court of Appeals of the United States has basically set out a holding that the U. S. Government may donate property to itself without consideration for the limited authority of the Government to act except by statutory requirements. There is nothing in the record which indicates that the property transferred in any way constituted surplus property of no value or that the transferee agency paid a fair value to the TVA for the acquisition of the property known as the Fontana Addition. In fact, the TVA transferred the land to the Department of the Interior under a contract dated July, 1943, in which the Department of the Interior was

to compensate the State of North Carolina and others for the floodage of a highway and other property losses, which at the time of this Petition has never been complied with by the Department of the Interior.

11. The unprecedented ruling by the Fourth Circuit that a transfer of one agency's property to another constitutes a public donation within the meaning of the Enabling Act failed to take into consideration that the lands within the proposed boundaries of the park could not be purchased by appropriation of public monies. That once this land was obtained by the United States with public monies it could not be included within the Great Smoky Mountains National Park. Justice Reid in "U.S. vs. Welch," while upholding the right of the Government to condemn the lands for a public purpose recognized that the question of the authority of the TVA to turn the lands over to the Department of the Interior was not before the Court at that time. The

authority to include the lands within the park boundaries had never been considered by any Court and this is a case of first impression.

The decision of the lower court that this constituted a public donation failed to consider what the Supreme Court of the United States recognized in Welch. The Court found the reason for the purported transfer was an accommodation or consideration from the TVA to the Department of the Interior and if it was a transfer for valuable consideration the same could not be construed as a donation as contemplated by the Enabling Act.

Further, the United States Court of Appeals failed to consider the Management Act 40 U.S.C. 471 through 483, which provided how property must be transferred between agencies or the Act which was in existence at the time of this purported transfer which was the Act known as the "Surplus Property Act of 1944" within Title 50 War and National Defense.

Since the 44,000 acres known as the Fontana Addition were acquired with Government funds appropriated by Congress and transferred for consideration, the 44,000 acres should not be included within the Great Smoky Mountains National Park since the Enabling Act prohibits the acquisition of property within the boundaries with public monies.

CONCLUSION

If the property known as the 44,000 acres purchased with public monies should not have been included within the Great Smoky Mountains National Park because of the Enabling Act, then the Defendant Richard W. McLean was not guilty of violating Federal law and should not have been found guilty of carrying a weapon on the lands where he was charged and the case against him for the reasons hereinabove set out should be dismissed.

Respectfully submitted,

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Petitioner